BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	GN Docket No. 00-185 CS Docket No. 02-52

REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The People of the State of California and the California Public Utilities Commission ("California") respectfully submit these reply comments in response to the Notice of Proposed Rulemaking ("NPRM"), released March 15, 2002, by the Federal Communications Commission ("FCC") in the above-captioned proceedings.

California reiterates its position that the FCC should adopt an open access regime for cable modem service. California further urges the FCC not to forbear from regulating the transport component of cable modem service as common carriage under Title II of the Act. The adoption of an open access regime and the

regulation of cable modem transport under Title II are essential to meet the core policies of the 1996 Act – enhanced consumer choice of services at lower prices through competition, and the offering of services on just, reasonable, and nondiscriminatory terms. California will not repeat the reasons for its position here.

In these reply comments, California responds to comments, such as those by Verizon, that urge the FCC to generally preempt state regulation of cable modem service. California respectfully submits that preemption is not proper under applicable law.

As a matter of law, preemption cannot be sustained. As voice migrates to cable broadband technology, there is no question that much of this traffic will be intrastate and local. In California, over 75 percent of voice traffic is intrastate. To the extent that voice traffic originates and terminates in a given state, the regulation of such traffic is subject to the exclusive authority of the states. 47 U.S. C. § 152(b). This is so, regardless of the underlying technology used to transmit the voice traffic.

In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986), the Supreme Court held that Congress "fence[d] off from FCC reach or regulation intrastate matters." The court further rejected the argument that FCC preemption is barred only "when the matter to be regulated is purely local, and when interstate communication is not affected by the state regulation which the FCC seeks to pre-empt." Id. at 374. Such an argument, the court held, "misrepresents the statutory

scheme and the basis and test for pre-emption." Id. Congress understood that most, if not all, communications facilities are interchangeably used for interstate and intrastate services in a single, integrated network, id. at 373, but chose to tolerate the jurisdictional tensions that would necessarily arise from that fact. Id. at 375.

The "*only* limit that that the Supreme Court has recognized on a state's authority over intrastate … service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." California v. FCC, 905 F.2d 1217, 1243 (emphasis in orig.). This is the so-called impossibility exception noted in footnote 4 of Louisiana. 476 U.S. at 375, n.4.

Relying on Louisiana, the court in California v. FCC vacated the FCC's Computer III order because it impermissibly encroached on state authority over intrastate enhanced services in violation of section 152(b). The court also made clear that the impossibility exception is narrow and limited, and vacated the FCC's preemption of state structural and nonstructural regulations governing the provision of intrastate services as insufficiently narrowly tailored so as to fall within this exception. 905 F.2d at 1243-45.

In this case, state authority over intrastate or local voice calls using cable broadband technology does not negate the exercise of the FCC's authority over interstate traffic using such technology. The FCC has never attempted to preempt the state's jurisdiction to ensure that residential and other customers continue to

receive intrastate and local voice service on just and reasonable terms and conditions. The FCC should not do so here simply because a high-speed technology is used in lieu of narrowband technology to place intrastate and local voice calls.

Nor, with respect to ISP-bound traffic, would the assertion of state authority to set service quality standards and ensure reasonable terms and conditions of service, such as billing and termination practices, negate the exercise of federal authority over such traffic. For example, the FCC has properly not sought to interfere with state regulation that requires adequate prior notice to customers before their ISP-bound service is terminated. In circumstances such as these, the application of the so-called impossibility exception is simply not justified.[1]

Like the FCC, California seeks to promote the deployment of competing broadband technologies so that California customers realize the benefit of greater choice of services at lower prices promised by the 1996 Act. Indeed, in section 706, reproduced at the note to 47 U.S.C. § 157, Congress expressly preserved the dual regulatory scheme by directing both the FCC and the states to further the deployment of advanced telecommunications services, without regard to any transmission media or technology. Congress further specified in section 706 that both the states and the FCC should exercise their regulatory jurisdiction to promote

[1] In California v. FCC, 39 F.3d 919 (9th Cir. 1994), the court upheld federal preemption of the particular state structural and nonstructural safeguards at issue there because the FCC had sustained its burden of showing that it was
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practicably infeasible for the differing federal and state safeguards to co-exist.

advanced telecommunications services. Congress thus expressly carved out a role for the states to play in furthering advanced services, such as cable broadband transmission service, and did not intend for the FCC to preempt state regulation I the name of implementing a uniform regulatory scheme.

At the same time, California seeks to ensure that its customers enjoy all of the basic consumer protections that Congress intended to maintain under the Act when providers of information services own or control the essential transmission facilities upon which these services are provided. In California, millions of residential customers, particularly those residing in mid-sized cities, have access to cable modem service as their only broadband transmission service option. There are no viable, competing broadband service alternatives for these customers. In these circumstances, nothing in the Act indicates congressional intent to oust the states from adopting basic consumer protections for these captive customers.

In sum, state regulation is fully compatible not only with the goals of encouraging broadband deployment and promoting intermodal competition, but also

with ensuring basic consumer protections. Preemption of state regulation is flatly inconsistent with congressional intent and contrary to sound public policy.

Respectfully submitted,

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